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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,364	12/08/2003	Michael T. Morman	KCX-654B (19124B)	2821
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EXAMINER				
CRAIG, PAULA L				
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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/730,364	Applicant(s) MORMAN ET AL.
Examiner PAULA L. CRAIG	Art Unit 3761

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 11 July 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-9, 13, 14, 16-19 and 25.
Claim(s) withdrawn from consideration: 10-12, 15, 20-24 and 26-28.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Tatyana Zalukaeva/
Supervisory Patent Examiner, Art Unit 3761

Continuation of 11. does NOT place the application in condition for allowance because: Applicant argues that the absorbent core 36 of Serbiak is not itself non-extensible, but is only rendered non-extensible by being fixed to the base structure to form a non-extensible area 37, which is defined by the area over which the absorbent core 36 is effectively attached to the base structure 26. Applicant argues that therefore Serbiak does not teach a non-extensible absorbent body structure sandwiched between the outer cover member and the bodyside liner. In an apparatus claim, whether the absorbent body structure is non-extensible due to its own construction and materials, or is made non-extensible by attachment to some other component, is irrelevant in a 35 USC 103(a) determination. The limitation of how the absorbent body structure is constructed may be treated as a product by process limitation. As set forth in MPEP 2113 product by process claims are not limited to the manipulations of the recited steps, only to the structure implied by the steps. Once a product appearing to be substantially the same or similar is found, a 35 U.S.C. 103 rejection may be made and the burden is shifted to applicant to show an unobvious difference. See MPEP 2113, In re Thorpe, 227 USPQ 964 (Fed Cir. 1985), and Ex parte Masham, 2 USPQ2d 1647 (BPAI 1987).

Applicant argues that Fig. 2 of Serbiak shows that elastic layer 28 is continuous, and that therefore the elastic layer 28 fails to leave a space between the strips as required by Applicant's Claims 1 and 25. However, Serbiak clearly states that elastic layer 28 can be disposed only where the extensible zones 30-30D are, and does not need to be present in the nonextensible areas; this would leave a space between the strips (Figs. 1, 3-6, and 8; col. 2, lines 42-47, col. 9, lines 18-23).

For Claim 9, Applicant argues that Serbiak does not teach the two elastomeric strips being attached to the base layer material in a generally tensioned state. The claim does not require that the absorbent article is constructed by a step of attaching the elastomeric materials to the base layer material while the elastomeric materials are in a generally tensioned state; even if it did, this would be no more than a product by process limitation. As Claim 9 stands, it requires no more than that under at least some conditions the elastomeric materials are in a generally tensioned state at the same time as the elastomeric materials are attached to the base layer material. The elastomeric materials of Serbiak are fully capable of being placed in a state of tension while attached to the base layer material by extending the material (Figs. 1-9, col. 7, lines 11-36).

For Claims 5 and 7, Applicant argues that the leg elastics of Krautkramer are attached to the underlying substrate while the leg elastics are in a highly tensioned condition, and that therefore the leg elastics would not form a flat planar composite region. The elastics of Krautkramer are fully capable of forming a flat planar composite region under at least some conditions (Abstract, col. 7, lines 11-41). In any case, Krautkramer is relied on to teach bicomponent spunbond materials for Claim 5, and webs of elastomeric fibers in an elastomeric material for Claim 7, rather than a flat planar composite region.